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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. CHARLES NORMAN MURPHEY, Defendant and Appellant.	G052004 (Super. Ct. No. 12NF2642) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Kevin Haskins, Judge. Affirmed.

James M. Crawford, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlton and Christopher P. Beesley, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted defendant Charles Norman Murphey of first degree burglary. (Pen. Code, §§ 459, 460.)[1] In addition to the remainder of his sentence, the trial court directed him to pay $1,472 in restitution to the victims. On appeal, he argues the trial court erred by not instructing the jury on the lesser included offense of trespass and by entering the restitution order. We find that neither contention has merit, and therefore affirm the judgment.

I

FACTS

The victims in this case, the Durham family,[2] live in Anaheim Hills. Their property shared a driveway with their neighbor, William (Bill) Lang. Defendant's wife was Lang's niece. The defendant and his wife, along with their two children, resided with Lang.

In June 2012, the Durhams went on vacation, leaving Alexander Tinajero to check on their house and care for their pets. On June 29, Tinajero entered the home. As he unlocked the front door, he heard noise which led him to believe someone else was in the house. He immediately went back outside. He called Samantha[3] to ask her whether anyone else was supposed to be inside the house. She replied that no one except him should be there. As they were talking, Tinajero saw defendant exit the home. He apologized for frightening Tinajero and said that he was the neighbor. Tinajero asked if he was Bill, and defendant said he was his nephew. Defendant went across the driveway

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[1] All further statutory references will be to the Penal Code.

[2] The Durhams are Steven and Sharon Durham, and their two daughters, Samantha and Alexandra. We refer to the Durhams by their first names for the ease of the reader; no disrespect is intended.

[3] Samantha, who was living with her parents at the time, was dating Tinajero.

to the Lang home. Tinajero went inside the Durham home, and called Samantha to tell her what had happened.

When they returned, the Durhams found someone had tampered with and moved financial papers. They also found that a prescription for Vicodin was missing. The Durhams eventually contacted the police, and they investigated, interviewing Steven, Sharon, and Tinajero.

Defendant was charged with, and eventually found guilty of, first degree residential burglary. (§§ 459, 460.) The trial court placed defendant on probation for three years and ordered him to pay $1,472 in restitution to the victims for the installation of a home security system and three years of monitoring fees. The defense objected to the restitution award, arguing it lacked the proper basis and that defendant had moved from Lang's home and would no longer be in the vicinity. The court rejected these contentions. Defendant now appeals.

II

DISCUSSION

Instructional Error

Defendant argues the court erred by failing to, sua sponte, instruct the jury on trespass as a lesser included offense. He is mistaken.

A court has a sua sponte duty to instruct a jury on a lesser included offense if there is substantial evidence to support it. (*People v. Shockley* (2013) 58 Cal.4th 400, 403-404.) Conversely, a judge does not have a sua sponte duty to instruct on a lesser related offense that is not necessarily included in the charged offense. (*People v. Birks* (1998) 19 Cal.4th 108, 136.) A lesser related offense is generally less serious than the charged offense, but it is in some way similar to, or transactionally related to the charged offense. "[U]nder the appropriate circumstances a court may choose to grant a defendant's request for a lesser related instruction if substantial evidence supports the

instruction and the prosecutor consents." (*People v. Lam* (2010) 184 Cal.App.4th 580, 583.)

Courts "have applied two tests in determining whether an uncharged offense is necessarily included within a charged offense: the 'elements' test and the 'accusatory pleading' test. Under the elements test, if the statutory elements of the greater offense include all of the statutory elements of the lesser offense, the latter is necessarily included in the former. Under the accusatory pleading test, if the facts actually alleged in the accusatory pleading include all of the elements of the lesser offense, the latter is necessarily included in the former." (*People v. Reed* (2006) 38 Cal.4th 1224, 1227-1228.)

As to the elements test, it is not relevant here. It is "well settled that trespass is not a lesser . . . included offense of burglary." (*People v. Birks*, *supra*, 19 Cal.4th at p. 118, fn. 8.) A trespass is an entry unto lands "for the purpose of injuring any property or property rights or with the intention of interfering with, obstructing, or injuring any lawful business or occupation carried on by the owner of the land, the owner's agent, or the person in lawful possession." (§ 602, subd. (k).) A burglary, however, is an entry into a specified place with the intent to steal or commit a felony. (§ 459.) Accordingly, a burglary "can be perpetrated without committing any form of criminal trespass." (*Birks*, at p. 118, fn. 8.)

With respect to the accusatory pleading test, we look to the """language describing the offense in such a way that if committed as specified [some] lesser offense is necessarily committed."""" (*People v. Lopez* (1998) 19 Cal.4th 282, 288-289.) The information in this case alleged defendant "did unlawfully enter an inhabited dwelling house . . . with the intent to commit larceny." Defendant claims the "unlawfully enter" language of the pleading brings this within the ambit of trespass, but we disagree.

Burglary is a specific intent crime, and defendant's argument ignores his intent, which was "to commit larceny." An intent to commit larceny is synonymous with

an intent to commit theft. (See *People v. Fenderson* (2010) 188 Cal.App.4th 625, 640-641.) "[I]t cannot be said that the intent charged in the information, namely, an intent to commit theft, embraces any intent described in section 602, subdivision (j), namely, a purpose to injure property or property rights or an intent to interfere with, obstruct, or injure a lawful business 'carried on by the owner of such land, his agent or by the person in lawful possession.'" (*People v. Harris* (1961) 191 Cal.App.2d 754, 758, fns. omitted.) Thus, defendant could have entered the victims' home with the intent to commit larceny without having any intent to commit a trespass. Accordingly, we reject defendant's contention that trespass is a lesser included offense of burglary under the accusatory pleading test in this instance. There was no instructional error.

Restitution

Defendant next argues the court abused its discretion by ordering defendant to pay the victims $1,472 for the installation and three years[4] of monitoring fees for a home security system. He contends this was not reasonably related to the underlying offense because defendant no longer lived at his uncle's home and would not be nearby.

The statute governing restitution is section 1202.4. The version of 1202.4 in effect at the time defendant was sentenced stated: "[I]n every case in which a victim has suffered economic loss as a result of the defendant's conduct, the court shall require that the defendant make restitution to the victim or victims in an amount established by court order, based on the amount of loss claimed by the victim or victims or any other showing to the court. If the amount of loss cannot be ascertained at the time of sentencing, the restitution order shall include a provision that the amount shall be determined at the direction of the court. The court shall order full restitution unless it finds compelling and extraordinary reasons for not doing so and states them on the record

[4] Three years was the length of defendant's probation.

. . . ." (Former § 1202.4, subd. (f).) Restitution is intended to "fully reimburse the victim or victims for every determined economic loss incurred as the result of the defendant's criminal conduct . . . ." (Former § 1202.4, subd. (f)(3).) Under certain circumstances, this may include the installation of a home security system. (Former § 1202.4, subd. (f)(3)(J).)

We review restitution orders for abuse of discretion. (*People v. Phu* (2009) 179 Cal.App.4th 280, 284.) "'A victim's restitution right is to be broadly and liberally construed.' [Citation.] '"[S]entencing judges are given virtually unlimited discretion as to the kind of information they can consider"' in determining victim restitution. [Citations.]" (*Id.* at pp. 283-284.) "'While it is not required to make an order in keeping with the exact amount of loss, the trial court must use a rational method that could reasonably be said to make the victim whole, and it may not make an order which is arbitrary or capricious.'" (*People. v. Mearns* (2002) 97 Cal.App.4th 493, 498.)

Restitution can also be ordered as a condition of probation. Like statutory restitution orders, our review is for abuse of discretion. (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1121.) "A condition of probation will not be held invalid unless it '(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality . . . .' [Citation.]" (*People v. Lent* (1975) 15 Cal.3d 481, 486, fn. omitted (*Lent*), abrogated by Prop. 8 on another ground as recognized in *People v. Wheeler* (1992) 4 Cal.4th 284, 290-292.) "The [*Lent*] test is clearly in the conjunctive, that is, the three factors must all be found to be present in order to invalidate a condition of probation." (*People v. Balestra* (1999) 76 Cal.App.4th 57, 65, fn. 3; see *Lent*, at p. 486, fn. 1.)

Defendant argues that because he has moved away from the area and no longer presents a threat, the restitution order was arbitrary and capricious. The security system is certainly related "to the crime of which the defendant was convicted." (*Lent*,

supra, 15 Cal.3d at p. 486.) It is also related to the goal of deterring future criminality. "'Restitution is an effective rehabilitative penalty because it forces the defendant to confront, in concrete terms, the harm his actions have caused.'" (*People v. Carbajal*, *supra*, 10 Cal.4th at p. 1124.)

Further, his argument that he has moved away is both off the mark and legally irrelevant. It is off the mark because while defendant may have moved away from the immediate area, he is still related to the victims' neighbor, and it is certainly plausible he will revisit the neighborhood. This argument is legally irrelevant because even if he had moved far away with no reason to ever return, the probation condition still passes the test set forth in *Lent*. The court did not abuse its discretion by ordering this form of restitution.

III

DISPOSITION

The judgment is affirmed.

MOORE, ACTING P. J.

WE CONCUR:

IKOLA, J.

THOMPSON, J.